that have nothing to do with whether lack of access to the incumbent's network would or would not impair their ability to offer service in that market. For example, it is likely that not all competitive LECs intend to invest in their own facilities to serve residential customers. Congress, however, clearly intended for competition to develop in these markets, as well as in the business markets, and we see as one of the primary goals of section 251, to facilitate competition in these markets. Because the ground work for competition is still uncharted, and we have seen very limited competition in the residential market to date, we seek to remove economic and other barriers that may forestall the development of competition for these consumers. Accordingly, we unbundle elements in a manner that we believe will have the desired effect of promoting competition in all markets as quickly as possible.

(iii) Other Factors to Be Weighed in Our Unbundling Analysis

101. We conclude that, in addition to the necessary" and "impair" standards, section 251(d)(2) permits us to consider other factors that are consistent with the objectives of the Act in making our unbundling determination. Section 251(d)(2) states that, "[i]n determining what network elements should be made available for purposes of subsection 251(c)(3), the Commission shall consider, at a minimum" the "necessary" and "impair" standards."[172] This language implies clearly that other factors may be considered as long as we consider the "necessary" and "impair" standards. Moreover, as the D.C. Circuit has held, when Congress requires an agency to "consider" several listed factors, it may also consider additional factors in making its decision. For example, in *Central Vermont Railway, Inc. v. Interstate Commerce Commission*, the D.C. Circuit found that the language of a statute addressing railroad mergers that directed the Interstate Commerce Commission to "consider at least the following [factors]," also allowed the agency to consider factors other than those specifically listed.[173] In a later case that cited *Central Vermont Railway*, the court explained that an agency's duty to "consider' specific factors means only that it must "reach an 'express and considered conclusion' about the bearing of a factor, but is not required to give 'any specific weight' to the factor."[174]

102. In the *Local Competition First Report and Order*, the Commission stated that it agreed with several incumbent LECs that the plain import of the "at a minimum" language in section 251(d)(2) requires the Commission to consider the standards enumerated there, "as well as other standards we believe are consistent with the objectives of the 1996 Act."[175] The Supreme Court did not dispute this determination. In fact, it

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172 47 U.S.C. § 251(d)(2).

173 *Central Vermont Ry. v. ICC*, 711 F.2d 331, 335 (D.C. Cir. 1983) (*Central Vermont Ry. V. ICC*).

174 *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 175 (D.C. Cir. 1995) (quoting *Central Vermont Ry. v. ICC*, 711 at 336).

175 *Local Competition First Report and Order*, 11 FCC Rcd at 15641, para. 280.

directed us to adopt "some limiting standard rationally related to the goals of the Act."[176] We are therefore not persuaded by the argument of the incumbent LECs that we may now require unbundling only where the "necessary" or "impair" standards have been met.[177] If Congress had intended to require the incumbent LECs to unbundle an element only when it was "necessary" to, or would "impair" the requesting carrier's ability to provide its desired service, Congress would not have used the discretionary phrase "consider at a minimum." Rather, Congress would have required the Commission to apply the "necessary" and "impair" standard, without consideration of any additional factors.

103. Accordingly, in addition to the "necessary" and "impair" standard, we conclude that we may consider several factors, set out below, that further the goals of the Act in accordance with the Supreme Court's directive. Two fundamental goals of the Act are to open the local exchange and exchange access markets to competition and to promote innovation and investment by all participants in the telecommunications marketplace.[178] To further the goal of opening the local market to competition, we may consider how access to specific unbundled network elements will encourage the rapid introduction of local competition to the benefit of the greatest number of consumers.

104. We may also consider how the unbundling rules we adopt will promote facilities-based competition by competitive LECs. We believe that it is the development of facilities-based competition that will provide both incumbent and competitive LECs with the incentives to innovate and invest in new technologies. Such innovation and investment will bring greater choices of telecommunication services and lower prices to a greater number of consumers. We may also consider the extent to which we can reduce regulatory obligations to provide access to network elements as alternatives to the incumbent LECs' network elements become available in the future.

105. We may further consider whether unbundling particular network elements will provide certainty in the market so that competitive LECs can attract investment capital and execute their business plans. We may also take into account how we can make the unbundling rules administratively manageable for the Commission and the states to apply. The adoption of administratively workable unbundling rules will enable the Commission and the states to implement and enforce such rules, thereby facilitating the ability of competitive LECs to enter the market as quickly and efficiently as possible.

106. We do not give particular weight to any of the factors we identify. Rather, we consider the relationship among the factors we take into account for a particular network element, and determine whether the sum total of the effect of the factors require a finding that the element must be unbundled. Thus, we do not require that all of the factors be met before we decide whether or not to require incumbent LECs to unbundle a

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176 *Iowa Utils. Bd.*, 119 S. Ct. at 734.

177 *See, e.g.*, GTE Comments at 27-28; Ameritech Joint Reply Comments at 23-25.

178 *Joint Explanatory Statement* at 1.

particular network element. Indeed, there may be circumstances in which there is significant evidence that competitors are impaired without unbundled access to a particular element, but that unbundling the element would not further the goals of the Act. In the final analysis, as we explain in more detail below, we consider the effect of these factors in order to develop unbundling obligations that are most consistent with Congressional intent.

107. Rapid Introduction of Competition in All Markets. Congress has emphasized that a major goal of the 1996 Act is to accelerate the development of local competition. Indeed, the preamble to the Act states that it provides a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly" deployment of advanced telecommunications technologies by opening all markets to competition.[179] With regard to unbundled network elements, in particular, the Eighth Circuit Court of Appeals found that the use of unbundled elements promotes the prompt development of competition, as intended by the Act. The court stated that the Act "provides for unbundled access to incumbent LECs' network elements as a way to jumpstart competition in the local telecommunications industry."[180] We therefore find that we may consider whether an unbundling obligation is likely to encourage requesting carriers to rapidly enter the local market and serve the greatest number of customers. Conversely, we may also consider whether the failure to require unbundling will cause any class of consumers to wait unnecessarily for competitive alternatives.

108. We also note that Congress specified certain network elements in the section 271 checklist that BOCs are required to unbundle before they obtain in-region interLATA relief. In particular, the checklist requires BOCs to demonstrate that they are providing loops, switching, transport, signaling and databases, and operator services/directory assistance.[181] Accordingly, we may consider whether requiring all incumbent LECs to unbundle these same elements would promote the rapid introduction of competition on a nationwide basis.

109. We agree with NTIA that there is a common purpose between sections 251 and 271 of the Act of opening the incumbents' monopoly local exchange networks to competition.[182] We believe that Congress intended section 251(c)(3) of the Act and the competitive checklist to contain similar, if not identical, obligations. Although we do not conclude that the checklist determines definitively that all incumbent LECs are required, pursuant to section 251, to unbundle the items enumerated in section 271, we find that section 271 sheds some light on what elements Congress believed should be unbundled in order to open local markets to competition. We may therefore consider whether an

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179 *Id.*

180 *Iowa Utils Bd. v. FCC*, 120 F.3d at 811.

181 47 U.S.C. § 271(c)(2)(B).

182 NTIA Comments at 35-40.

element is among the elements identified in the competitive checklist as we make our determination of which network elements incumbent LECs must provide on an unbundled basis.

110. Promotion of Facilities-Based Competition, Investment, and Innovation. A fundamental goal of the Act is to promote investment and innovation by all participants in the telecommunications marketplace, and, in particular, to encourage rapid deployment of new telecommunications technologies.[183] As the Commission has stated, the construction of new local exchange networks "will not only lead to innovation by the new competitors, but should also spur [the incumbent LECs] to upgrade their systems and offer a broader array of desired service options to meet consumers' demands."[184] By promoting innovation both by the incumbent LECs and competitive LECs, the Act enables these carriers to produce innovative new services for consumers. Specifically, consumers benefit when carriers invest in their own facilities because such carriers can exercise greater control over their networks, thereby promoting the availability of new products that differentiate their services in terms of price and quality. We may therefore consider the extent to which the unbundling obligations we adopt will advance the development of facilities-based competition and will encourage innovation by both incumbent and competitive LECs.

111. We seek to adopt unbundling requirements that are broad enough to provide requesting carriers with the elements they need to ramp up towards facilities deployment. At the same time, we remain cognizant of the Supreme Court's mandate against granting blanket access to the incumbents' network in a manner that is inconsistent with the "necessary" and "impair" standards of section 251(d)(2), or with the goals of the 1996 Act.[185] We believe that the standards we articulate in this Order will strike the appropriate balance by unbundling only those network elements without which a competitive LEC's ability to provide service will be materially diminished.

112. We agree with the competitive LECs that argue that unbundled access to certain incumbents' network elements will accelerate initially competitors' development of alternative networks because it will allow them to acquire sufficient customers and the

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183 *Joint Explanatory Statement* at 1. *See also* NTIA Comments at 15, n.42, (citing H.R. Rep. No. 104-204, at 47-48 (1995)("For decades, U.S. telecommunications policy has relied heavily on regulated monopolies to provide telecommunications service to business and consumers.... Technological advances would be more rapid and services more widely available and at lower prices if telecommunications markets were competitive rather than regulated monopolies."); 141 Cong. Rec. S8015 (daily ed. June 8, 1995) (statement of Sen. Pressler) ("if we had done what we are trying to do in this bill – that is, to require [incumbent LECs] to unbundle and interconnect, to allow for local competition,... the whole telephone communications industry might be more innovative today than it is.")).

184 *Competitive Networks Notice* at para. 23.

185 *Iowa Utils, Bd.*, 119 S. Ct. a 735. *See also* NTIA Comments at 25 ("[The Commission] should seek so far as possible to construe [Section 251(d)(2)] in a way that advances the procompetitive goals of the 1996 Act, including the promotion of facilities-based competition.")

necessary market information to justify the construction of new facilities.[186] Indeed, many commenters in this proceeding emphasize that they plan to deploy alternative facilities as soon as it is technically and economically possible to do so at a cost that is close to the incumbent LECs' prices for network elements.[187] According to these commenters, competitive LECs prefer to use their own facilities or alternatives outside of the incumbent's network when they are able to do so, in order to reduce their reliance on a primary competitor.[188] We find this explanation to be reasonable. Use of the incumbent LEC's network elements requires competitive LECs to disclose details about their customers to their chief competitor. Moreover, it is reasonable to expect that competitive LECs would prefer to have direct control of their networks to ensure the quality of their service and to offer products and pricing packages that differentiate their services from the perspective of end users.[189]

113. Reduced Regulation. Another goal of the Act is to deregulate where market conditions warrant.[190] We may therefore consider the extent to which we can reduce regulatory obligations to provide access to network elements as alternatives to the incumbent LECs' network elements become available in the future.

114. Certainty in the Market. Among other things, the Act seeks to promote competition by eliminating barriers to entry into the local market. We may therefore consider how the unbundling obligations we adopt in this Order facilitate competitive entry. Accordingly, we find that the unbundling requirements we adopt should typically provide the uniformity and predictability new entrants and fledgling competitors need to develop and implement national and regional business plans. In addition, uniform and predictable unbundling rules will provide financial markets with reasonable certainty so that competitive LECs can attract the investment capital they need to execute their business plans. Specifically, uniform and predictable unbundling rules reduce substantially competitive LECs' risk of underutilized investment or cash flow drain by providing financial markets with some certainty that the competitors will be able to execute their business plans.

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186 *See, e.g.*, AT&T Comments at 11-12, 21-22 (stating that using unbundled network elements also facilitates the transition to facilities-based competition because it permits entrants to gather critical information, such as customers' calling volumes and traffic patterns, that they need to plan their facilities' deployment); MCI WorldCom Comments at 8-9; Sprint Reply Comments at 8.

187 *See, e.g.*, AT&T Reply Comments at 33-34; CompTel Comments at 12; MCI WorldCom Comments at 8-9, 26-27; Net2000 Comments at 2; Sprint Comments at 19-21 ("Any carrier desiring a significant market presence over the long term must consider self-provisioning as the most desirable business strategy – indeed the only strategy that can ensure that a carrier is the master of its own fate.")

188 *See* MCI WorldCom Comments at 8-9; Sprint Comments at 20; ALTS Reply Comments at 23-24; MCI WorldCom Reply Comments at 19.

189 *See Competitive Networks Notice* at para. 4; Sprint Comments at 19.

190 *Joint Explanatory Statement* at 1.

115. We also find that we should, whenever possible, adopt unbundling obligations that can be included easily in interconnection agreements between the incumbents and the competitive LECs, with as little risk of subsequent litigation as possible. Litigation over the incumbents' unbundling obligations requires the parties to these agreements, and the state commissions that approve them, to expend vast amounts of time and resources, ultimately impairing the ability of competitive LECs to execute their business plans.

116. Administrative Practicality. We may also consider whether the unbundling rules we adopt are administratively practical to apply. Any rule adopted in an administrative proceeding runs the risk of being potentially overinclusive in some situations and under-inclusive in other situations. A rule of general applicability rarely will neatly fit all situations. Nonetheless, administrative agencies are entitled to proceed by rulemaking as well as by adjudication.[191] In addition, the goal of administrative efficiency has widespread support from diverse segments of the industry, even where they disagree on the substantive outcome of the proceeding.[192] We therefore seek to adopt unbundling rules that provide for administrative ease in addressing the incumbents' unbundling obligations today, as well as in the future, as alternatives to incumbent LEC network elements become available. We believe that adopting rules that are administratively practical to apply will also enhance certainty in the marketplace by allowing us to apply the rules efficiently to respond to changes in the marketplace.

C. Adoption of a National List of Unbundled Network Elements

1. Background

117. In the *Local Competition First Report and Order*, the Commission concluded that identifying a specific list of network elements that must be unbundled, applicable in all states and territories, would best further the "national policy framework" Congress established to promote competition in local markets. In particular, the Commission found that a national list would: (1) allow requesting carriers, including small entities, to take advantage of economies of scale; (2) provide financial markets with greater certainty in assessing requesting carrier's business plans; (3) facilitate the states' ability to conduct arbitrations; and (4) reduce the likelihood of litigation regarding the requirements of section 251(c)(3).[193]

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[191] Our mandate from the Court is similar to other instances in which federal agencies have implemented a general rule of applicability. *See FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *Checkosky v. SEC*, 23 F.3d 452 (D.C. Cir. 1994); *Northeast Utils. Service Co. v. FERC*, 993 F.2d 937 (1993).

[192] *See, e.g.*, Ameritech Comments at 5 (stating that Ameritech's proposed standards are "easy to administer."); CPI Comments at 13 (stating that the Commission should make regulation efficient by avoiding case-by-case decisions); KMC Comments at 2-3 (stating that a national list of unbundled elements allows for more efficient implementation of the 1996 Act).

[193] *Local Competition First Report and Order*, 11 FCC Rcd at 15616-27, paras. 226-48, 281-83.

118. In the *Notice*, we stated that we found nothing in the Supreme Court's decision that would require us to eliminate national unbundling requirements. We tentatively concluded that we should continue to identify a minimum set of network elements that must be unbundled on a nationwide basis, and sought comment on this conclusion. We also sought comment on whether the existence of geographic variations in the availability of elements outside of the incumbent LEC's network is relevant to a decision to impose minimum national unbundling requirements.[194]

119. Nearly all of the state commissions commenting in this proceeding,[195] and all of the competitive LECs,[196] assert that we should adopt a national list of unbundled elements. The state commissions agree that the Commission has authority to adopt such a list, and that it should implement a process for the states to modify the list in the future, based on conditions that exist in a particular state.[197] The New York Commission also proposes that, in establishing the national list, we should evaluate whether to exclude an element from the unbundling obligations in discrete market areas where commercially viable alternatives are available.[198] The incumbent LECs argue, on the other hand, that the Supreme Court's decision in *Iowa Utils. Bd.* requires a geographic market-by-market analysis that will ultimately not result in a national list of unbundled elements. These carriers propose that the Commission adopt national standards to be applied by state commissions on a market-by-market basis.[199]

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194 *Notice* at para. 14.

195 California PUC Comments at 3-4; Connecticut DPUC Comments at 3-4; Illinois Commission Comments at 2; Iowa Comments at 1-2; Kentucky PSC Comments at 2; New York DPS Comments at 4-7; Ohio PUC Comments at 3-5; Oregon PUC Comments at 1; Texas PUC Comments at 2-3; Washington UTC Comments at 3-5; NARUC Reply Comments at 3; New Jersey DRA Reply Comments at 11; Wisconsin PSC Reply Comments at 3-4. *But see* Florida PSC Comments at 7-8 (suggesting that the Commission establish a "rebuttable presumption" in favor of unbundling network elements listed in section 271 of the 1996 Act instead of adopting a national list).

196 *See, e.g.*, Ad Hoc Comments at 3; Allegiance Comments at 2-4; AT&T Comments at 39-46; Cable & Wireless Comments at 22-28; Choice One Joint Comments at 2-3; Columbia Comments at 8; CO Space Comments at 4-5; Corecomm Comments at 8-10; Covad Comments at 3-6; CPI Comments at 4-6; Excel Comments at 17-19; KMC Comments at 2-3; MCI WorldCom Comments at 4-10; Net2000 Comments at 3-7; New England Voice & Data Comments at 4, n.4; NEXTLINK Comments at 3-7; NorthPoint Comments at 1-3; OpTel Comments at 2; Prism Comments at 3-5, 9-10; Rhythms Comments at 9; TelTrust Comments at 2; TRA Comments at 9-10 Waller Creek Comments at 11-12.

197 *See, e.g.*, NARUC Reply Comments at 3; California PUC Comments at 3-4; 7-14; Illinois Commission Comments at 2-3; Kentucky PSC Comments at 2; New York DPS Comments at 3-7; Ohio PUC Comments at 3-5, 21; Oregon PUC Comments at 1; Texas PUC Comments at 3-5; Washington UTC Comments at 3-9.

198 New York DPS Comments at 4-5.

199 *See, e.g.*, Ameritech Comments at 5-6, 53-65; BellSouth Comments at 12-18, 31; GTE Comments at 20-22; SBC Comments at 15-18; US West Comments at 26-32.

2. Discussion

120. We adopt our tentative conclusion to identify a minimum list of network elements that should be unbundled on a national basis. Similar to New York's proposal, we also conclude, as explained below, that we must apply discrete geographic and product market exceptions to the incumbent's duty to unbundle the elements on the national list, where appropriate. We conclude that the Commission has the legal authority to adopt a national list of network elements that must be made available on an unbundled basis, and that the other factors we identify above, such as rapid introduction of competition, certainty in the marketplace, administrative practicality, and promotion of facilities-based competition, can only be furthered by adoption of a national list.

a. Legal Authority

121. The Supreme Court decision in *Iowa Utils. Bd.*, the statutory language of section 251(d)(2), and the legislative history of the 1996 Act support our authority to develop a national list of unbundled elements. In particular, the Supreme Court upheld explicitly the Commission's jurisdiction to adopt minimum national rules to implement each subsection of the 1996 Act.[200] Consistent with the language in the statute, the Supreme Court stated that section 251(d)(2) ". . . requires the Commission to determine on a rational basis *which network elements must be made available*, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements."[201] The Court stated that some of the national unbundling rules the Commission adopted originally in the *Local Competition First Report and Order* might have been supported by the standard required by section 251(d)(2). The Court stated however, that because the standard was not consistently applied, it was forced to vacate Rule 319.[202] As explained above, we have adopted a limiting standard that we believe responds to the Supreme Court's concerns.[203] We have also applied the standard consistently to derive a list of network elements that must be made available on an unbundled basis nationwide.

122. In addition, we do not find that the Supreme Court decision in *Iowa Utils. Bd.* requires us to determine, on a localized state-by-state or market-by-market basis which unbundled elements are to be made available. The Commission examined the

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200 *Iowa Utils. Bd.*, 119 S. Ct. at 733.

201 *Id.*, at 736 (emphasis added).

202 *Id.* (citing *Local Competition First Report and Order*, 11 FCC Rcd at 15766, paras. 521-22 (requiring the incumbent LECs to unbundle their operational support systems because "competitors' ability to provide service successfully would be significantly impaired if they did not have access to the incumbent LECs' operation support system functions.")).

203 *See supra* Section (IV)(B).

conditions in the nation as a whole to determine, in the *Local Competition First Report and Order,* that the incumbent LECs must make available a minimum list of elements. The Commission also concluded that it would not adopt an exhaustive list of elements, but that the states would identify additional unbundling obligations based on local market conditions.[204] The Supreme Court did not take issue with this determination. The Court held that the Commission must determine on a rational basis which network elements must be made available, taking into account "the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements of section 251(d)(2)."[205] Although this language permits the Commission to undertake a market-by-market assessment of alternatives, it plainly does not mandate such an approach. Rather, it provides the Commission with the discretion to look at the nation as a whole and to identify differences in the availability of alternatives outside of the incumbent's network that may exist in discrete geographic areas.

123. However the Commission chooses to limit the incumbent LEC's duty to unbundle in accordance with the Supreme Court's opinion, Congress has charged the Commission in section 251(d)(2) with "determining what network elements should be made available for purposes of subsection [251](c)(3)."[206] We thus have the authority to identify a minimum list of network elements that must be unbundled on a nationwide basis.[207] In addition, the legislative history indicates that Congress specifically contemplated that the Commission would open the last monopoly bottleneck strongholds in telecommunications by requiring incumbents to share their local exchange facilities, including "the equipment with capabilities of routing and signaling calls, network capacity, and network standards."[208] This legislative history indicates that Congress expected the Commission would identify a national list of unbundled network elements that would include, at a minimum, these basic network elements.

b. Goals of the Act

124. We find that adoption of a national list of unbundled network elements furthers the statutory purpose and design of section 251(d)(2) to provide competitive LECs with access to unbundled network elements that will allow them to provide the services they seek to offer. Moreover, we find that adoption of a national list is supported by the factors we identify above as being important to further the fundamental goals of the Act.

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204 *Local Competition First Report and Order*, 11 FCC Rcd at 15624, para. 243.

205 *Iowa Utils. Bd.*, 119 S. Ct. at 736.

206 47 U.S.C. § 251(d)(2).

207 47 U.S.C. § 251(d)(2). *See also Iowa Utils. Bd.*, 119 S. Ct. at 736 (section 251(d)(2) "requires the Commission to determine on a rational basis *which* network elements must be made available") (emphasis in original).

208 H.R. Conf. Rep. 104-204, at 49 (1995).

125. Rapid Introduction of Competition. We find that a national list of unbundled elements will encourage the rapid introduction of competition in the greatest number of markets because it will provide competitive LECs with certainty regarding the availability of network elements. In fact, the record reflects that many competitive LECs are poised to begin providing service using unbundled elements, particularly for residential and small business customers, as soon as the elements are available with a reasonable degree of certainty.[209] Thus, we believe that the certainty that adoption of a national list will bring to the market will benefit the greatest number of consumers, particularly residential and small business customers.

126. We agree with AT&T that the lack of nationwide access to unbundled elements will hinder mass market competition during the time it would take competitive LECs to construct alternative networks capable of serving all residential customers and most business customers in a community.[210] Even in areas where competitors are able to provide facilities-based service in specific wire centers, their ability to provide service on an MSA, LATA, or state-wide basis, for all classes of customers, is impaired without access to the incumbent's elements on a broader basis. A national list of unbundled elements will allow requesting carriers to enter local markets in a manner that will allow them to approach the incumbent LECs' historic economies of scale, scope, and ubiquity, thereby promoting rapid competition for all customers, including residential and small business customers, in all areas of the country.

127. According to the *FCC Local Competition Report*, competitors provide only about 1.8 percent of local services to end users.[211] The record in this proceeding indicates that requesting carriers have not yet been able to obtain unbundled elements on a wide-spread basis nationwide, which may have prevented competitive LECs from serving a greater number of end users. For example, only recently has unbundled switching been made available in combination with other unbundled network elements in certain states. MCI WorldCom observes that, with the availability of unbundled switching in New York, it has been able to provide local service to upwards of 60,000 residential customers since

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209 *See, e.g.*, Corecomm Comments at 2-3 ("As it expands its operations in Ameritech and Bell Atlantic's incumbent areas, Corecomm intends to make increasing use of high quality, cost-based unbundled network elements from the [incumbent LECs] to reach those residential customers that may be beyond the reach of most competitive carriers' facilities."); Covad Comments at 2 ("Covad's planned deployment by the end of 1999 will cover 51 MSAs, more than 25 percent of the nation's homes and businesses. This is a large-scale, national roll-out, based upon the nationwide availability of collocation, unbundled dedicated transport, and unbundled local loops."); McLeod Comments at 1-2 ("As of March 31, 1999, McLeodUSA provided competitive local exchange services to over 143,000 residential and small business customers, with over 395,000 lines....McleodUSA anticipates that use of unbundled network elements to provide service will increase in the future, and therefore has a substantial interest in the outcome of this proceeding."); NorthPoint Comments at 3 ("...the simple fact is that in the local markets in which NorthPoint currently offers service or intends to in the near future, the incumbent LECs are the only ubiquitous sources for loops, transport and other facilities that NorthPoint needs to provide service.").

210 AT&T Reply Comments at 3-4.

211 *FCC Local Competition Report* at 12.

January, 1999.[212] We believe that by re-establishing a national list, with certain geographic and product market exceptions that are consistent with the standards of section 251(d)(2), we will best promote efficient, rapid, and widespread entry by carriers using unbundled network elements. Competitive market entry and service expansion on a widespread basis is a necessary precondition to construction of self-provisioned facilities.

128. Moreover, as the Illinois Commerce Commission; California PUC, and Connecticut Department of Public Utility Control all assert, a national list will allow competition to proceed quickly because it will reduce the number of issues that the states must address in upcoming arbitrations under section 252(b) of the Act.[213] This is significant because many states will be conducting arbitrations and reviewing interconnection agreements as the initial agreements that they approved in 1996 and 1997 begin to expire.

129. We are not persuaded by Ameritech's argument that adoption of national standards containing bright-line tests, as opposed to a national list of unbundled elements, would facilitate arbitrations.[214] Using the bright-line test proposed by Ameritech is inappropriate because the test does not allow us to consider the totality of the circumstances to determine whether alternative elements are actually available as a practical, economic, and operational matter. Moreover, the resources and time that requesting carriers would be required to devote to individual regulatory proceedings designed to determine if the bright-line criteria had been met in every market would delay the introduction of competition. The outcomes of each proceeding would likely vary across the country, thereby making it more difficult for competing carriers to execute reasonably uniform national or regional business plans. We believe that a national list of elements will better allow carriers to enter the market and to expand their businesses as rapidly as possible.

130. As explained below, we will revisit our unbundling rules in three years. Although we recognize that due to changes in the market and new technologies, the national list will likely be modified over time, we do not find that we should delay the onset of meaningful competition while we require the incumbent LECs and the competitors to produce voluminous amounts of data and participate in multiple proceedings to determine whether alternatives to the incumbent's network are available and being used in every market. We believe that a national list (that accounts for discrete geographic and product market exceptions) that can be applied at this time, with the least

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212 MCI WorldCom Comments, Tab 1, Decl. of Judith R. Levine/Ronald J. McMurtrie, at para. 17. *See also* AT&T Reply Comments at 15-18 (stating that because for the last three years, critical unbundled network elements have been effectively unavailable because of the Eighth Circuit's decision on Rule 315(b), competition has existed only at the margins, and has been limited to portions of the highest volume customer markets.).

213 Illinois Commission Comments at 2; California PUC Comments at 3-4; Connecticut DPUC Comments at 3.

214 Ameritech Comments at 64-65.

amount of regulatory involvement, will allow carriers to deploy resources to provide service to the greatest number of consumers instead of conducting regulatory proceedings.

131. We note that we established recently collocation-based triggers to determine when it would be appropriate to grant incumbent LECs pricing flexibility for certain interstate access services based on the existence of competition for those services.[215] In the *Pricing Flexibility Order*, we stated that the triggers we adopted were policy determinations based on our agency expertise and our interpretation of the record before us in that proceeding. We acknowledged, however, that the use of triggers to measure competition precisely is not an exact science, particularly because we lack verifiable data from competitors concerning the deployment of their facilities. Given this constraint, and our desire not to impose heavy administrative burdens on the industry or conduct protracted proceedings to determine the extent of competition, we devised pricing flexibility triggers based on "objectively measurable criteria,"[216] such as the number of collocation arrangements in a given wire center.[217] We found that it is appropriate to give incumbent LECs pricing flexibility when competitors have made an irreversible, sunk investment in facilities, and that collocation by competitors in incumbent LEC wire centers is a reliable indication of sunk investment by competitors.[218] Specifically, to obtain pricing flexibility, we required incumbent LECs to show that "*at least one* competitor relies on transport facilities provided by a transport provider other than the incumbent at each wire center listed in the incumbent's pricing flexibility petition as the site of an operational collocation arrangement."[219]

132. It is not appropriate to use these types of triggers to determine whether alternative sources of network elements are actually available as a practical, economic, and operational matter. As we explain above, the ability of one competitor to serve certain customers in a particular market is not indicative of whether, without unbundled access to the incumbent LEC's facilities, competitive LECs could provide service to other customers in the same market or to customers in other markets. While the triggers we adopted in the *Pricing Flexibility Order* allow us to determine when an incumbent LEC can re-price its services to respond to competition, they do not allow us to evaluate whether the incumbent LEC can withhold access to the inputs that requesting carriers need to provide competitive services in the first place. In order to undertake this evaluation, we must consider the cost, timeliness, quality, ubiquity and operational

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215 *Access Charge Reform and Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 96-262, *et al.*, Fifth Report and Order and Further Notice of Proposed Rulemaking, FCC 99-206, paras. 77-141 (rel. Aug. 27, 1999) (*Pricing Flexibility Order*).

216 *Id.* at para. 84.

217 *Id.* at para. 77.

218 *Id.* at paras. 81-86.

219 *Id.* at para. 82 (emphasis added).

characteristics of alternative elements. As we explain above, discerning the practical, economic, and operational viability of these alternatives is technical, complex, and subject to considerable uncertainty.[220] Based on the record before us, we do not believe that we can develop reliable triggers based on objectively measurable criteria to make this determination. In particular, the administrative difficulty associated with developing triggers that capture the cost, timeliness, quality, ubiquity, and operational factors of alternatives in every wire center throughout an incumbent LEC's service territory requires us to reject such an approach. Indeed, the Commission chose precisely to adopt triggers in the *Pricing Flexibility Order*,[221] because we found that they were administratively easy to apply. Conversely, it would not be administratively easy to apply triggers to determine which network elements the incumbent LECs must unbundle. Moreover, the use of triggers also does not allow us to evaluate whether the unbundling obligations we adopt are consistent with the goals of the Act, as the Supreme Court has required us to do.[222]

133. Moreover, a national list of unbundled network elements will facilitate the introduction of rapid competition by eliminating needless litigation that would result from unbundling requirements that differ in every market. Such litigation would require incumbent LECs, competitive LECs, and the state commissions to expend considerable time and resources to litigate issues surrounding whether a particular unbundled network element should be available to individual carriers seeking to serve specific customers or specific areas of the state. Although there has been significant litigation over the past three years regarding the incumbent's duty to unbundle elements under section 251(c)(3),[223] we believe that re-establishing a national list, subject to the Supreme Court's mandate to include a rational limiting standard, will reduce the likelihood of further litigation and its accompanying delays and costs, in all fifty states.

134. Promotion of Facilities-Based Competition, Investment, and Innovation. We find that adoption of a national list will facilitate the deployment by competitors of their own facilities. Permitting competitors to obtain access to unbundled elements on a broad basis will allow these carriers to acquire sufficient customers and essential market information to enable them to determine whether construction of new facilities is justified. We believe that it is through self-provisioning their own facilities that competitive LECs will have a greater ability to serve all classes of customers.

135. Ameritech claims that the Commission "dismissed outright" the principal goal of the 1996 Act to encourage new investment and innovation by all competitors in the market when it adopted national unbundling rules.[224] According to Ameritech, the

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220 *See supra* Section (IV)(B)(4)(b)(ii).

221 *Pricing Flexibility Order* at para. 77.

222 *Iowa Utils. Bd.*, 119 S. Ct. at 734.

223 *Id.* at 736.

224 Ameritech Comments at 17.

national unbundling rules adopted in 1996 protected inefficient competitors and discouraged efficient entrants from investing and innovating in telecommunications services as the Act intended.[225] Based on the incumbents' own evidence, we find this argument lacking in credibility.

136. The incumbent LECs have submitted a market study in this proceeding, the USTA UNE Report, that details the competitive LECs' investment in their own facilities on an element-by-element basis since the passage of the 1996 Act, and *during* the time that the Commission's national unbundling rules have been in effect.[226] Although the Commission's unbundling rules have been the subject of extensive litigation, none of the parties dispute that competitors have used unbundled elements, particularly unbundled loops and transport, where these elements have been made available. Yet, the incumbents' UNE Report shows that competitors have built nearly 30,000 miles of fiber within the top 50 MSAs, serving nearly 15 percent of all commercial office buildings.[227]

137. The USTA UNE Report also states that competitors have deployed approximately 700 switches to serve medium and large business customers.[228] The report indicates that these carriers have deployed fixed wireless connections to extend their fiber networks out to many more customers.[229] The incumbents also assert that many competitors are providing advanced services by attaching their own facilities to the incumbent LEC's unbundled cooper loops.[230] Overall, the incumbents estimate that competitive LECs are offering service over approximately 2.5 million facilities-based lines in the incumbents' service territories.[231] As explained more fully below, these facilities are still not available broadly enough to prevent competitive LECs, in most cases, from being impaired in their ability to provide service without access to the incumbent's network. Nonetheless, the data presented by the incumbents shows significant and growing investment by the competitive LECs. Accordingly, we find no merit in the claim made by Ameritech and other incumbent LECs that unbundling elements will impede the Act's goal of encouraging new investment and innovation in telecommunications services.

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225 *Id.* 17-27.

226 USTA Comments, Peter W. Huber and Evan T. Leo, UNE Fact Report (*USTA UNE Report*).

227 *Id.* at II-6, III-3.

228 *Id.* at I-1.

229 *Id.* at 11-4, III-10 to 12.

230 *Id.* at VI-19-20.

231 *Id.* at III-16 (The incumbent LECs state that this total excludes US West's territory.).

138. The incumbents also claim that national unbundling requirements will discourage them from investing and innovating, particularly if they have to unbundle elements for the provision of advanced services.[232] While we desire to do nothing to discourage investment and innovation by all carriers, we note that the Commission's national unbundling policy has clearly not discouraged incumbent LECs from seeking to serve new markets. Although in the *Local Competition First Report and Order*, the Commission did not order unbundling of certain equipment used in providing advanced services, it made clear that the states could extend the incumbents' unbundling obligations as necessary to account for changes in technology and to address local conditions.[233] Incumbent LECs have therefore known since 1996 that they might eventually be required to unbundle elements used to provide advanced services. Moreover, last year, in the *Advanced Services Order and NPRM*, we sought specifically comment on whether to unbundle facilities used to provide advanced services.[234] Notwithstanding the fact that the incumbents have been on notice that they could be required to unbundle facilities used to provide advanced services, the incumbents have announced aggressive rollout plans for xDSL service.[235] In fact, a recent financial analyst's report indicates that advanced data services currently comprise an average of 9.9 percent of the revenues of the BOCs and GTE.[236] Although the incumbents claim that competitors have deployed more advanced

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232 *See* Ameritech Comments at 25-27, BellSouth Reply Comments at 7-9; SBC Reply Comments at 27.

233 *Local Competition First Report and Order*, 11 FCC Rcd at 15619, para. 234.

234 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24092-93, paras. 180-82 (*Advanced Services Memorandum Opinion and Order and NPRM*), *remanded US West Communications v. FCC*, No. 98-1410 (D.C. Cir. Aug. 25, 1999).

235 Today's broadband services include services based on digital subscriber line technology (commonly referred to as xDSL), and include ADSL (asymmetric digital subscriber line) services. *See, e.g.*, *Communications Daily*, Nov. 20, 1998, 1998 WL 10697801 (Bell Atlantic announces plans to deploy xDSL capable lines in Boston and New York City to a total of three million customers); *Communications Daily*, Feb. 9, 1999, 1999 WL 7578715(Bell Atlantic announces that its xDSL service will pass by 20 million households in-region by the end of 2000, with 10 or 11 million lines qualified for xDSL upgrade by that date); *Communications Daily*, July 29, 1999, 1999 WL 7580057 (Bell Atlantic and GTE announces that the total number of xDSL-capable lines available in-region by year's end will be 17 million, and that they will have ADSL capability installed in 550 central offices by year's end, thereby allowing it to serve potentially as many as 6.1 million DSL lines); *Communications Daily*, July 21, 1999, 1999 WL 7580000 (SBC announces that it had 32,000 DSL customers as of the end of 2nd quarter 1999. SBC plans to reach 10 million homes with xDSL-capable wires by the end of 1999); US West at http://www.uswest.com/about/communicator/vol2no1/7.html (US WEST launched ADSL service in 40 in-region metropolitan areas, Jan. 29, 1998); BellSouth at http://www.bellsouthcorp.com/proactive/documents/render/16942.html (BellSouth announced roll-out of BellSouth.Net Fast Access ADSL Internet service in 30 markets. Service began in seven key markets: New Orleans, Atlanta, Birmingham, Jacksonville, Raleigh, Charlotte, and Ft. Lauderdale encompassing 1.7 million customers by the end of 1998. It states that service will extend to 23 additional markets in 1999.).

236 Daniel Reingold and Ehud Gelblum, *Telecom Services – Local*, Merrill Lynch & Co., July 12, 1999, at 3.

services equipment than the incumbents have deployed,[237] they nevertheless acknowledge that the incumbent LECs are offering advanced services in 7 of the 10 largest MSAs and in 22 of the top 50 MSAs.[238] We find these statistics to be significant because they demonstrate that the development of competition, and the threat of losing revenue and customers to carriers offering advanced services, provides a powerful incentive for carriers to invest.

139. We therefore conclude, as the Commission did in the *Local Competition First Report and Order*, that by adopting a national list of elements, and by giving the states the flexibility to add elements as technology and local market conditions change, we will not discourage incumbent LECs from investing and deploying innovative services.[239] The incumbent LECs will have an increased incentive to reduce their operating and capital costs and to introduce new and innovative services that will increase the overall usage level of their networks as they face competition for all of their services. Moreover, the Commission's pricing methodology includes a risk-adjusted return on capital and economic depreciation for the incumbent as part of the forward-looking rate.[240] As we indicated above, we are also adopting a "necessary" standard that fully protects the incumbents' intellectual property associated with proprietary network elements when those elements are used by the incumbent to differentiate its products from those of its competitors.[241] We therefore do not find merit in arguments that the adoption of a list of network elements that must be unbundled nationwide will discourage innovation and investment by incumbent or competitive LECs.

140. Certainty in the Marketplace. We find that a national list of unbundled elements will provide uniformity and predictability that will facilitate the development and implementation of national and regional business plans by competitive LECs, thereby extending the benefits of competition for the greatest number of consumers. We agree with the California PUC that a national list will allow multi-state competitors to create a national business plan with the knowledge that a set of network elements will be available in all states.[242] Indeed, we find that the unavailability of elements on a nationwide basis

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237 To the extent that network innovations are undertaken by equipment vendors, they are not subject to the unbundling rules we adopt.

238 USTA UNE Report at VI-19.

239 *Local Competition First Report and Order*, 11 FCC Rcd at 15626, para. 245 ("We are not persuaded that national rules will discourage incumbent LECs from developing new technologies and services; to the contrary, based on our experience in other telecommunications markets, we believe that competition will stimulate innovation by incumbent LECs.").

240 *Local Competition First Report and Order*, 11 FCC Rcd at 15849-50, paras. 686-88; MCI WorldCom Comments at 9 and Tab 2, Decl. of John E. Kwoka, at para. 25.

241 *See supra* Section IV(B)(2).

242 California PUC Comments at 3. *See also* CPI Comments at 5; MCI WorldCom Comments at ii, 5; Net2000 Comments at 4-5.

would jeopardize the usefulness of unbundled elements as a method of serving the maximum number of consumers.[243]

141. We also continue to believe that national unbundling requirements will provide financial markets with greater certainty regarding the elements that are available to competitive LECs. Such certainty should reduce the risk of entry, thereby making more capital available at less cost to new entrants and fledgling competitors.[244] We do not agree with Ameritech that a national list would perpetuate uncertainty in capital markets because carriers would challenge the list regardless of what elements it contains.[245] As stated above, we believe that a national list will actually reduce the risk of litigation.

142. Administrative Practicality. We find that a national list of unbundled elements is administratively easier for the Commission, the states, and the industry to apply than a list that varies on a state-by-state or market-by-market basis. As we stated in the *Notice*, application of the "necessary" and "impair" standard is fact-intensive.[246] Determining the availability of practical alternatives to the incumbents' network elements on a market-by-market basis, even through the use of bright-line tests as proposed by the incumbent LECs, would potentially require the Commission or the states to analyze the availability of alternatives in almost every wire center. In addition to creating uncertainty in the market, such a proposal would consume enormous amounts of resources and time, thereby undermining the goal of the Act to bring the benefits of rapid competition to all consumers. Such an approach would also require a new analysis each time a new carrier sought to initiate service in a particular market, and would likely lead to additional litigation by adversely affected carriers.[247] We do not believe that Congress or the Supreme Court had in mind the adoption of a procedure that would impose such an

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243 For example, MCI WorldCom points out that the Commission declined to order nationwide unbundling of certain elements in the *Local Competition First Report and Order*, including subloop elements and dark fiber. It states that this led to dozens of state commission arbitrations and subsequent lawsuits, and that where determinations have been made on the availability of these elements, MCI WorldCom reports that the outcomes have been inconsistent from one state to another, for reasons having nothing to do with geographic or market differences. It states that the result has been that competitive LECs have been unable to formulate any national or regional strategies that rely on the use of dark fiber or subloop elements. MCI WorldCom Comments at 7-8.

244 *See* NorthPoint Comments at 2 ("Further, as the Commission correctly anticipated, the establishment of national requirements for unbundled elements has assisted NorthPoint in its efforts to attract capital by providing 'financial markets with greater certainty in assessing new entrants' business plans'"). The availability of a national list of elements will also provide certainty for incumbent LECs seeking to raise capital to enter markets outside of their service territories.

245 Ameritech Comments at 64.

246 *Notice* at para. 12.

247 *See* MGC Comments at 8 (stating that a national list is an administrative necessity and required for business certainty).

undue—and unworkable—administrative burden on the Commission, the states, or the industry.

143. Reduced Regulation. We believe that a national list of elements that contains discrete geographic and product market exceptions will result immediately in reduced regulation. Moreover, a national framework under which elements can be removed from the national list is consistent with the deregulatory goals of the Act. Reduced regulation will occur as we remove elements from the list as requesting carriers are no longer impaired without access to those elements, and it otherwise does not further the goals of the Act to continue requiring incumbent LECs to unbundle them.

D. Modification of the National List

1. Background

144. In the *Local Competition Order First Report and Order*, the Commission acknowledged that the rapid pace and ever-changing nature of technological advancement in the telecommunications industry made it essential that the Commission retain the ability to revise the rules as circumstances change. The Commission noted that, absent such ability, its rules might impede technological change and frustrate the 1996 Act's overriding goal of bringing the benefits of competition to consumers of local phone service. Accordingly, the Commission determined that, in addition to identifying unbundled network elements that incumbent LECs were required to make available at the time the original rules were adopted, it had the authority to identify additional or different unbundling requirements that would apply to incumbent LECs in the future.[248]

145. In the *Local Competition Order First Report and Order*, the Commission also determined that state commissions could impose additional unbundling requirements, as long as the requirements were consistent with the 1996 Act and our regulations.[249] The Commission codified this grant of authority in section 51.317 of its rules.[250] The Commission believed that the states' authority to impose additional requirements, combined with its ability to modify the national unbundling rules, provided the necessary flexibility to accommodate any truly unique conditions that might exist.[251] The

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248 *Local Competition Order First Report and Order*, 11 FCC Rcd at 15626, para. 246. The Commission also noted that its existing rules set forth a process by which incumbent LECs could request a waiver of the requirements adopted in the *Local Competition First Report and Order*. *Id.* at 15625, para. 244.

249 *Id.* We based this grant of authority on 47 U.S.C. 252(e)(3), which states: "Preservation of Authority. – Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements." 47 U.S.C. 252(e)(3). Section 252(e)(3) requires interconnection agreements to be submitted to the state commission for approval.

250 47 C.F.R. 51.317.

251 *Local Competition Order First Report and Order*, 11 FCC Rcd at 15625, para. 244.

Commission, however, did not address the issue of whether states could remove elements from the national list.

146. In the *Notice* we sought comment on whether the Commission should adopt an approach that would allow sunset or modification of the section 253(c)(3) unbundling obligations as technology and market conditions evolve over time.[252] We noted that, under our rules, states have the authority to impose additional unbundling requirements.[253] We sought comment on whether section 251(d)(2), or any other provision of the Act, provides the Commission with the authority to delegate to the states the responsibility of removing network elements from any national requirement.[254] We sought comment on proposals for a mechanism for removal, including which party should bear the burden of proof.[255] We asked whether the Commission should consider a phase-out period for network elements removed from the national list. Further, we asked whether we should institute a period of time during which incumbents could not seek removal of network elements from our new unbundling rules.[256] We also asked whether we could adopt a "sunset" provision.[257]

147. Several of the state commissions argue that they have the authority to add and subtract elements from the national list,[258] while the Vermont and Illinois state

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252 *Notice* at paras. 11, 36.

253 *Id.* at para. 14 (citing 47 C.F.R. § 51.317; *Local Competition First Report and Order*, 11 FCC Rcd at 15641-42, paras. 281-83). In the *Notice*, we noted that the Supreme Court's analysis of section 251(d)(2) might have a bearing on Rule 51.317, but that the Court did not directly address that issue. We also noted that the Commission asked the Eighth Circuit for a voluntary remand of Rule 51.317 so that the Commission may consider it in light of the Supreme Court's decision. *Notice* at 14, n.21. In requesting a remand from the Eighth Circuit, the Commission did not attempt to defend the substance of Rule 51.317. Nothing in this Order interferes or is intended to interfere with the Eighth Circuit's jurisdiction over this matter.

254 *Notice* at paras. 14, 38. As part of this inquiry, we asked if the Commission should be able to review state decisions to remove network elements. *Id.* at para. 14.

255 *Id.* at para 37. We asked if there was a modification of an unbundling requirement whether an incumbent LEC should be required to continue to unbundle a particular element identified in an interconnection agreement until the date that the agreement expired. We also asked whether an incumbent LEC should be able to refuse to unbundle a network element that is no longer required when negotiating a new contract with other parties. *Id.* at para. 36.

256 *Id.* at para. 37.

257 *Id.* at paras. 39-40.

258 Iowa Comments at 2 ("Network elements should be added or removed by the state commissions pursuant to the record made before the commissions in proceedings to arbitrate and modify interconnection agreements."); New York DPS Comments at 5-6; Ohio PUC Comments at 3-5; Oregon PUC Comments at 1; Texas PUC Comments at 3 ("It is the Texas PUC's belief that the Commission has the authority to allow states to have substantial discretion in the addition or removal of network elements from the presumptive national list."); Washington UTC Comments at 7 (claiming that "the Commission could

commissions argue that the Commission should establish a set of unbundling obligations to which the state may add additional unbundling obligations.[259] BellSouth argues that states should be able to add or remove unbundled elements in a particular zone.[260] SBC and GTE oppose allowing the states to add or subtract elements.[261] US West argues that states should be able to determine whether network elements no longer need to be unbundled, but that they not be allowed to add network elements.[262] The vast majority of competitive LECs that commented in this proceeding, as well as NTIA and ALTS, argue that the states should be allowed to add, but not to remove, elements from the national list.[263]

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implement something analogous to state commission authority to 'subtract' elements from the federal list."); NARUC Reply Comments at 3.

259 Vermont PSB Comments at 4-5 (arguing that the Act "establish[es] a *floor* beneath which State regulatory bodies may not go, but not a *ceiling* on State efforts to encourage competition"(emphasis in original)); Illinois Commission Comments at 4. *See also* Kentucky PSC Comments at 1-2 (arguing that "state commissions should evaluate issues involving [unbundled network elements] not specifically prescribed by the [Commission]"); California PUC Comments at 9, 13 (urging the Commission to delegate to the states the authority to remove network elements added by the states); Connecticut DPUC Comments at 4.

260 BellSouth Comments at 29-30. As part of its proposals, BellSouth argues that the Commission should establish a "strong presumption" against adding network elements to the list.

261 SBC Comments at 18-19; GTE Comments at 29.

262 US West Comments at 29-32.

263 NTIA Comments at 42, n.114; ALTS Comments at 5-6; CoreComm Comments at 10-12; e.spire Joint Comments at 7; Joint Consumer Advocates Comments at 5-6; McLeod Comments at 3; MGC Comments at 7; Net2000 Comments at 6; NEXTLINK Comments at 5-7; OpTel Comments at 3, 14; Prism Comments at 10; Qwest Comments at 40-42; RCN Comments at 4-5; AT&T Reply Comments at 67; CoreComm Reply Comments at 7; Level 3 Reply Comments at 12; MCI WorldCom Reply Comments at 10-11; RCN Reply Comments at 10. *See also* Covad Comments at 6 (opposing state authority to remove network elements from the national list) Metro One Comments at 19 (arguing that the Act does not provide the Commission with the authority to delegate to states the responsibility of removing network elements from the national list); Cable & Wireless Comments at 45-46 (opposing state authority to remove network elements from the national list). *But see* TRA Comments at 29-31 (arguing that for the first two years the Commission should review petitions, but, subsequently, state commissions should be able to add or remove network elements pursuant to the case law established during the first two years); Excel Comments at 19 (stating that it "would not object to rules giving the States a significant role in determining whether to remove [unbundled network elements] from the mandatory list after the initial three-year period"); ALTS Reply Comments at 6 ("The Commission only should consider adopting a mechanism for state-by-state removal of [unbundled network elements] from the national list after a two year period during which the Commission's unbundling rules are allowed to be given their full effect . . . .").

2. Discussion

a. Modification of the National List by the Commission

148. As discussed above, section 251(d)(2) grants the Commission authority to establish a national list of network elements that are subject to the unbundling requirements of the Act.[264] Given the rapid changes in technology, competition, and the economic conditions of the telecommunications market, we expect that the list of unbundled network elements that meets the standards of section 251(d)(2) will change over time. We therefore agree with commenters that we will need to reevaluate our national rules periodically.[265]

149. The need to reassess periodically the availability of elements outside the incumbent's network is borne out by the changes that have taken place since we first adopted our unbundling rules three years ago. For example, the evidence in this proceeding indicates that competition is developing in some geographic markets for certain customer groups, (*e.g.*, medium and large businesses in major metropolitan areas). Only by periodically reevaluating the availability of alternative network elements outside the incumbent's network can we truly determine whether the incumbent's network should be unbundled in order to meet the requirements of section 251 and the goals of the Act. We therefore conclude that as market conditions change and new technologies develop, we will periodically revisit the issue of what elements are subject to the unbundling obligations of the Act.

150. Although we will periodically revisit our unbundling rules, we believe that it would be inconsistent with our overall policy goals to consider petitions to remove elements from the national list immediately upon adoption of this order.[266] Specifically,

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264 *See supra* Section (IV)(D).

265 California PUC Reply Comments at 13; New York DPS Comments at 1,7; ALTS Comments at 6; CompTel Comments at 54; Cox Comments at 37-38; KMC Comments at 27; Level 3 Comments at 24; MCI WorldCom Comments at 11; McLeod Comments at 3; RCN Comments at 27; Rhythms Comments at 3, 28; AT&T Reply Comments at 51; KMC Reply Comments at 27; Rhythms Reply Comments at 14. *See also* Allegiance Comments at 24; Cable & Wireless Comments at 46; GTE Reply Comments at 79-80. *But see* OpTel Comments at 14-15 (arguing it is premature to establish mechanisms for removal); Sprint Comments at 40 (arguing that it is premature to address this issue at this time). Sprint is also concerned that "if the Commission gives any encouragement at all to [a] waiver option, it is likely to be inundated with such requests." Sprint Comments at 41. The California PUC recommends that the review process begin three years after the adoption of a minimal list. California PUC Reply Comments at 13. Allegiance recommends that removal be considered on an incumbent LEC-by-incumbent LEC basis. Allegiance Comments at 25.

266 *See* ALTS Comments at 6-7; MCI WorldCom Comments at 11; Sprint Comments at 41 (arguing for a five year "quiet period"); ALTS Reply Comments (recommending a two-year "gestation"

as discussed above, the rules we adopt today seek to provide a measure of certainty to ensure that new entrants and fledgling competitors can design networks, attract investment capital, and have sufficient time to attempt to implement their business plans.[267] Entertaining, on an *ad hoc* basis, numerous petitions to remove elements from the list, either generally or in particular circumstances, would threaten the certainty that we believe is necessary to bring rapid competition to the greatest number of consumers. In addition, entertaining numerous petitions on an *ad hoc* basis would undermine the goal of implementing unbundling rules that are administratively practical to apply.

151. We expect to reexamine our national list of network elements that are subject to the unbundling obligations of the Act every three years.[268] We note that many of the first interconnection agreements negotiated in 1996 are now approaching expiration of their typical three-year terms and will be eligible for renewal. We expect parties to implement the requirements of this Order as they negotiate new interconnection agreements. We find that a similar three-year time frame for reevaluating the unbundling obligations is warranted to provide competitors with reasonable certainty for a period of time that is sufficient time to implement their plans. Revisiting our rules in three years should provide sufficient certainty to the carriers and capital markets and should provide carriers with sufficient time to implement their plans.[269]

152. We decline to adopt a rule mandating that elements will not be subject to unbundling after a date certain in the future. Several parties have suggested that it would be extremely difficult for us to predict a date at which a particular network element would no longer meet the "necessary" and "impair" standards of section 251(d)(2).[270] As noted by the Illinois Commission, in the three years since the Act was implemented, no BOC has demonstrated that it satisfies the competitive checklist in section 271. In 1996, few would have expected that three years later BOCs would not have qualified for section 271 approval. This suggests that it would be similarly very difficult for us to predict, at this time, the date at which incumbent network elements would no longer be subject to unbundling obligations under section 251. Moreover, we note that we find no basis in the

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period); Rhythms Reply Comments at 14 (arguing that a two-year period may be too short).

267 Sprint Comments at 41. *See also* Excel Comments at 19.

268 *Accord* California PUC Reply Comments at 13; CO Space Comments at 16; Excel Comments at 19; MCI WorldCom Comments at 13 and Tab 2, Decl. of John E. Kwoka, para. 38; AT&T Reply Comments at 51.

269 *See* ALTS Comments at 7 (advocating a two year review cycle). This is consistent with the MFJ's tri-ennial review process. The review may begin after approximately only two years of experience so that it can be completed in three-year intervals.

270 Illinois Commission Comments at 15-16; Choice One Joint Comments at 27; MCI WorldCom Comments at 12; OpTel Comments at 14; RCN Comments at 26; Sprint Comments at 42-43; KMC Reply Comments at 27-28; Sprint Reply Comments at 12. *See also* CoreComm Comments at 40; KMC Comments at 27-28; Level 3 Comments at 24; California PUC Reply Comments at 14; Pilgrim Reply Comments at 12.

record before us to make predictive judgments about when an unbundling standard will no longer be met for particular network elements. Thus, at this point in time, we do not have enough information and experience to determine what events would lead to an automatic sunset of one of our unbundling requirements. Accordingly, at this time, we decline to adopt a sunset provision for removing network elements from the national list adopted in this Order.

b. Modification of the National List by the States

153. We agree with commenters that section 251(d)(3) provides state commissions with the ability to establish additional unbundling obligations, as long as the obligations comply with subsections 251(d)(3)(B) and (C).[271] Section 251(d)(3) states that:

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—
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> (A) establishes access and interconnection obligations of local exchange carriers;
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> (B) is consistent with the requirements of this section; and
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> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.[272]

154. This section of the statute allows state commissions to establish access obligations of local exchange carriers that are consistent with our rules implementing section 251.[273] We believe that section 251(d)(3) grants state commissions the authority to impose additional obligations upon incumbent LECs beyond those imposed by the national list, as long as they meet the requirements of section 251 and the national policy framework instituted in this Order. As explained below however, we find that state-by-state removal of elements from the national list would substantially prevent implementation of the requirements and purposes of this section of the Act.

155. Section 51.317 of the Commission's rules codifies the standards state commissions must apply to add elements to the national list of network elements we

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[271] California PUC Comments at 7-8; Washington UTC Comments at 6-7; Ameritech Comments at 48-49; NEXTLINK Comments at 6, n.17; NTIA Comments at 42; Allegiance Reply Comments at 13 (quoting 47 U.S.C. § 251(d)(3)); MCI WorldCom Reply Comments at 12-13; NARUC Reply Comments at 4; Washington UTC Reply Comments at 5-6. *But see* SBC Comments at 19 (arguing that section 251(d)(3) prevents states from adding network elements to the list).

[272] 47 U.S.C. § 251(d)(3).

adopt in this Order.[274] In its current form, Rule 51.317 reflects the Commission's interpretation of the necessary and impair standards adopted in the *Local Competition First Report and Order*. Inasmuch as we have modified the "necessary" and "impair" standard to respond to the Supreme Court's directive, we must also amend Rule 51.317 to reflect the new standards. Accordingly, we modify Rule 51.317, to bring it into compliance with our new standards and the Supreme Court's decision. Modification of this rule will enable state commissions to add additional unbundling obligations consistent with sections 251(d)(3)(B) and(C) of the Act.[275]

156. We agree with the California PUC that states have the authority to remove network elements *added by the states*. Thus, if a state commission, pursuant to section 251(d)(3), adds a network element to the list of network elements an incumbent LEC must provide, state commissions also have the authority subsequently to remove those elements they add.[276] As discussed above, section 251(d)(3)(A) allows state commissions to impose additional unbundling obligations as long as they comply with subsections 251(d)(3)(B) and (C). If a state commission determines that the additional unbundling obligations it imposed no longer comply with section 251, it must remove those obligations pursuant to section 251(d)(3). Beyond ensuring that removal of those state-imposed obligations are consistent with sections 251 and 253 of the Act, the Commission has no authority to prevent a state from removing a state-imposed unbundling obligation. Furthermore, state commissions that have imposed additional unbundling requirements, pursuant to section 51.317 of our rules, will need to periodically revisit such decisions to determine whether such decisions continue to comply with the standards articulated in this Order.

157. We conclude that, at this time, removing network elements from the unbundling obligations established in this Order on a state-by-state basis would not be consistent with the goals of the 1996 Act. Specifically, in this proceeding, we have examined each network element identified previously by the Commission or by the parties, and we have made an affirmative finding as to whether or not the particular element now satisfies the unbundling standards of the Act as clarified by the Supreme Court. Moreover, we have considered how unbundling these elements will affect the development of competition in the local markets as contemplated by Congress, and whether unbundling particular elements will further the goals of the Act. Indeed, we have found that unbundling particular network elements is necessary to further the goals of the Act. Consequently, at this time, state decisions to remove these network elements from

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273 California PUC Comments at 8; Washington UTC Comments at 6; Allegiance Reply Comments at 13-14. *But see* GTE Comments at 29; SBC Comments at 18-19.

274 47 C.F.R. § 51.317.

275 Rule 51.317 also codifies the standard under which this Commission will consider which network elements must be unbundled. *See* Appendix C.

276 California PUC Comments at 9; California PUC Reply Comments at 13.

the national unbundling obligations would "substantially prevent implementation of the requirements of section 251," as prohibited by subsection 251(d)(3)(C).

158. Furthermore, we find that there are compelling policy reasons for not removing elements from the national list on a state-by-state basis at this time.[277] Unbundling obligations that vary from state to state in the near future would substantially undermine the reasons discussed above for implementing a national list in the first instance.[278] We agree with commenters that argue that state-by-state removal of network elements from the national list, at least in the near future, would lead to greater uncertainty in the market and would hinder the development of competition.[279] As discussed above, we have determined that national unbundling rules promote competition in telecommunications market by guaranteeing that a specific set of network elements will be available nationwide for a minimum amount of time.[280]

159. We agree with the California PUC and other state commissions that having a guaranteed list of network elements provides enough certainty to allow competitive LECs to develop and implement regional and national business plans.[281] Creating certainty and predictability in the market will also benefit competition by enabling competitors to raise capital at lower cost to create and enhance their networks.[282] If each state could remove immediately the unbundling obligations established in this Order, competitors would not have the benefit of knowing how long an element would be available on an unbundled basis in any given locale. The resulting uncertainty would frustrate the ability of carriers to plan and implement competitive entry strategies developed to serve customers on a regional or national basis.

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277 Covad Comments at 7. Allegiance suggests that once the Commission has gained some experience with removing elements from the national list that it might be possible to formulate guidelines and turn the process over to the states. Allegiance Comments at 25. This would be an appropriate inquiry when this Commission reviews the national list in three years. *See supra* para. 151.

278 CompTel Comments at 53; Cable & Wireless Comments at 45-46; CoreComm Comments at 9, 11-12; MGC Comments at 7; Net 2000 Comments 5-7; NEXTLINK Comments at 5-6; CoreComm Reply Comments at 7. *See also supra* Section (IV)(D).

279 Illinois Commission Comments at 3; Kentucky PSC Comments at 2; ALTS Comments at 6; CompTel Comments at 53; CoreComm Comments at 9; NTIA Comments at 42, n.114; CoreComm Reply Comments at 9.

280 *See* Connecticut DPUC Comments at 3 (arguing that a minimum national list should facilitate competition by minimizing new entrant's cost by taking advantage of economies of scale as they enter multiple local markets); Kentucky PSC Comments at 2; MGC Comments at 6.

281 California PUC Comments at 3; Kentucky PSC Comments at 2; CoreComm Comments at 9; California PUC Reply Comments at 13.

282 MGC Comments at 7; NorthPoint Comments at 2.

160. We also agree with commenters that state-by-state removal of network elements from the national list would complicate negotiation of interconnection agreements and would most likely lead to increased litigation.[283] Indeed, it could force competitive LECs, each time they seek to enter into an interconnection agreement, to demonstrate that the identified elements continue to meet the standards of the Act.[284] Once an incumbent LEC is able to convince a state commission that the element no longer meets our unbundling standard, the ruling would likely set a precedent for other LECs. In addition, the possibility that a state decision in one interconnection proceeding could affect all interconnection agreements would require competitive LECs to monitor the status of these arbitrations even if they are not participants in the arbitration. We therefore agree with the Illinois Commission that having only this Commission remove elements from the national list makes it easier for the states to resolve disputed issues during inter-carrier negotiations and arbitrations.[285]

161. We believe that incumbent LECs have more of an incentive than competitive LECs to challenge the unbundling obligations set forth in this Order.[286] In addition to the delay and uncertainty created by litigating the unbundling obligations of incumbent LECs, state commissions, as well as incumbent LECs and competitors, would be faced with the additional costs of litigation.[287] Many state commissions and small carriers have limited resources and would be unduly burdened if they were have to finance on-going litigation of the unbundling rules.[288] Moreover, as several state

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283 Illinois Commission Comments at 4; CoreComm Comments at 9; Covad Comments at 7-8, 27; MCI WorldCom Comments at 6-7; MGC Comments at 8; NEXTLINK Comments at 6; Qwest Reply Comments at 42.

284 GSA Comments at 4 (arguing that uniform standards eliminate "the need to establish basic requirements for unbundling in each instance"); Net2000 Comments at 3 (claiming that "uniform nationwide rules would avoid re-litigation of the same issue in dozens of jurisdictions"); Qwest Comments at 41. *See also* Prism Comments at 4; KMC Reply Comments at 2.

285 Illinois Commission Comments at 4; Connecticut DPUC Comments at 3. *See also* California PUC Comments at 3-4 (stating that a national list "facilitates the arbitration process in individual states"); GSA Comments at 4 (claiming that "uniform unbundling standards will help state regulators to conduct arbitrations . . . without the need to establish basic requirements for unbundling in each instance"); NorthPoint Comments at 2 (stating that "national requirements have significantly eased the burden of interconnection negotiations and arbitrations for NorthPoint"); Qwest Comments at 39 (citing *Local Competition First Report and Order*, 11 FCC Rcd at 15,528, para. 56); Qwest Reply Comments at 42; Rhythms Reply Comments at 13 (arguing that a national list will streamline the state arbitration process).

286 CoreComm Reply Comments at 9. *See also* Qwest Comments at 41-42.

287 Prism Comments at 4-5; Qwest Comments at 41; CoreComm Reply Comments at 3. *See also* Allegiance Reply Comments at 3-4 (stating that the Commission's national rules "eliminated the need to litigate in state after state an incumbent LEC's obligation to offer access to loops and other particular network elements that facilities-based [competitive LECs] need to offer service"); CoreComm Comments at 9; Covad Comments at 7-8, 27; MGC Comments at 7-8; Sprint Reply Comments at 12.

288 ALTS Comments at 6; Covad Comments at 7-8, 27; TRA Comments at 31. *See also* Allegiance Comments at 3.